UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HOWARD ELLIS, Plaintiff, vs. BENEDETTI, et. al. Defendants.	3:08-cv-00657-ECR (WGC) **REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., Senior United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Plaintiff's Partial Motion for Summary Judgment. (Doc. # 109.)[1] Defendants opposed (Doc. # 116.) After a thorough review, the court recommends that Plaintiff's motion be denied.

I. BACKGROUND

At all relevant times, Plaintiff Howard Ellis (Plaintiff) was an inmate in custody of the Nevada Department of Corrections (NDOC). (Pl.'s Am. Compl. (Doc. # 38) at 1.) Plaintiff is currently housed at Lovelock Correctional Center (LCC). (*Id.*) Plaintiff, a *pro se* litigant, brings this action pursuant to 42 U.S.C. § 1983. (*Id.*) Defendants are James Benedetti, Tony Corda, Robert Hartman, Don Helling, Jeremy Jackson, Marsha Johns, Peter Ladner, Shannon Moyle, Roy Plumlee, Rex Reed, Ruben Vidaurii, Brian Williams, and Mark Wright. (Doc. # 38 at 2-5.)

Upon screening Plaintiff's Amended Complaint, the court determined that Plaintiff sets

[1] Refers to court's docket number.

forth the following colorable claims: (1) Count 1-procedural due process related to a disciplinary charge; (2) Count 2-Eighth Amendment excessive force and Eighth Amendment deliberate indifference to a serious medical need; (3) Count 3-First Amendment Access to Courts; (4) Count 4-procedural due process related to a disciplinary hearing and conspiracy; (5) Count 6-First Amendment retaliation; (6) Count7-Eighth Amendment excessive force and Eighth Amendment deliberate indifference to a serious medical need; (7) Count 8-First Amendment retaliation and conspiracy. (Screening Order (Doc. # 37).)

The court has concurrently issued a Report & Recommendation on Defendants' Motion to Dismiss (Doc. # 101) recommending: (1) Count 1 be allowed to proceed as to defendant Plumlee; (2) dismissing with leave to amend the claim in Count 1 as to defendant Williams; (3) dismissing without prejudice the Eighth Amendment excessive force claim in Count 2; (4) granting summary judgment as to the Eighth Amendment deliberate indifference claim in Count 2; (5) allowing the First Amendment access to courts claim in Count 3 proceed; (6) dismissing without prejudice the claims in Count 4; (7) granting summary judgment in favor of defendants as to Count 6; (8) denying the motion to dismiss for failure to exhaust administrative remedies as to Count 7; (9) dismissing without prejudice the retaliation and conspiracy claims in Count 8; and (10) dismissing Plaintiff's official capacity damages claims.

Plaintiff now moves for partial summary judgment. (Doc. # 109.)

II. LEGAL STANDARD

"The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). All reasonable inferences are drawn in favor of the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Summary judgment is appropriate if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.* (quoting Fed.R.Civ.P. 56(c)). Where reasonable minds could differ on the

material facts at issue, however, summary judgment is not appropriate. *See Anderson*, 477 U.S. at 250.

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Although the parties may submit evidence in an inadmissible form, only evidence which might be admissible at trial may be considered by a trial court in ruling on a motion for summary judgment. Fed.R.Civ.P. 56(c).

In evaluating the appropriateness of summary judgment, three steps are necessary: (1) determining whether a fact is material; (2) determining whether there is a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) considering that evidence in light of the appropriate standard of proof. *See Anderson*, 477 U.S. at 248-250. As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment; factual disputes which are irrelevant or unnecessary will not be considered. *Id.* at 248.

In determining summary judgment, a court applies a burden shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.'[ ] In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex*, 477 U.S. at 323-25. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress &*

Co., 398 U.S. 144, 160 (1970).

If the moving party satisfies its initial burden, the burden shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)(quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *Id.* Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See* Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. While the evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in its favor," if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 249-50, 255 (citations omitted).

III. DISCUSSION

First, Plaintiff appears to argue that he is entitled to summary judgment on the exhaustion defense. (Doc. # 109 at 5-7.) Plaintiff goes to great length to discuss the exhaustion requirements which are the subject of Defendants' Motion to Dismiss (Doc. # 101). Moreover, the *Defendants* have the burden of pleading and proving exhaustion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). Defendants' exhaustion arguments and Plaintiff's opposition are fully addressed in the court's Report and Recommendation on Defendants' Motion to Dismiss, being issued concurrently herewith. Accordingly, to the extent Plaintiff moves for partial summary judgment with respect to exhaustion, his motion should be denied.

Second, Plaintiff includes a declaration which states that he is a protective segregation inmate at Lovelock Correctional Center (LCC), and includes various details about a copy work order. (Doc. # 109 at 9-11.) Plaintiff does not have a claim related to copy work; therefore, summary judgment should be denied on this ground.

Third, Plaintiff essentially recites the allegations contained in his Amended Complaint for his remaining claims. (Doc. # 109 at 18-27.) Plaintiff has not "come forward with evidence which would entitle [him] to a directed verdict if the evidence went uncontroverted at trial.' [ ] In such a case, [Plaintiff] has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co.*, 213 F.3d at 480 (internal citations omitted). Accordingly, summary judgment should be denied. It should also be noted that the court has concurrently issued a Report & Recommendation on Defendants' Motion to Dismiss, recommending that dismissal and summary judgment be granted as to many of Plaintiff's claims.

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IV. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an Order **DENYING** Plaintiff's Motion for Partial Summary Judgment (Doc. # 109).

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, specific written objections to this Report and Recommendation within fourteen (14) days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the District Court's judgment.

DATED: May 14, 2012.

William G. Cobb

WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE